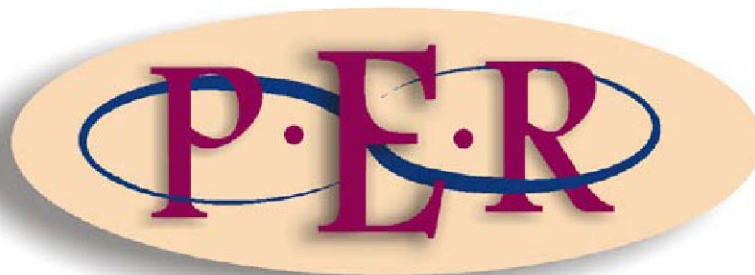


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RECTIFICATION AND PARTY MISDESCRIPTION: TO WHAT EXTENT IS RECTIFICATION COMPETENT OR USEFUL?

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1 Introduction

In *Weinerlein v Goch Buildings Ltd*¹ both Judge of Appeal De Villiers and Judge of Appeal Kotzé accepted² that the fact that an incorrectly recorded contract falls into a category of contract that legislation requires to be in writing and signed is not, in principle, a bar to rectification of the written record. Rectification is competent even though the written record, being in need of rectification, *ex hypothesi* does not correctly reflect what the parties agreed upon or intended and, therefore, does not comply with the formal requirements of the legislation.

In the recent case of *Osborne v West Dunes Properties 176*³ the court was required to determine if a written sale of land which named the wrong party as buyer and indicated, incorrectly, that the true buyer's agent had signed on behalf of that party was capable of rectification. The outcome of the case on the facts appears to be correct, but aspects of the court's reasoning are open to criticism. The case provides a useful vehicle for discussion of the legal principles governing rectification and party misdescription.

2 The facts

The property sold was a farm ("Farm 1581 Paarl") situated in the Drakenstein Municipality. The price was R17,5 million, of which a deposit of R2,5 million was paid upon signature. The seller – presumably the owner of the property (the report is silent on this) – was the first defendant (West Dunes Properties 176 (Pty) Ltd), represented by the fourth defendant (Le Roux). The second defendant conducted a restaurant business and the third defendant a wedding and conference facility on

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¹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282.

² *Weinerlein v Goch Buildings Ltd* 1925 AD 282 290, 294 respectively.

³ *Osborne v West Dunes Properties 176* 2013 6 SA 105 (WCC) (hereafter *Osborne*).

the property. The written agreement reflected the buyer as being the second plaintiff (PJ Osborne (Pty) Ltd), represented by the first plaintiff (Osborne). Both Le Roux and Osborne had signed the document in representative capacities. The description of the buyer in the document was as follows:

PJ Osborne (Pty) Ltd

Registrasienommer: 2012/036410/07

Harpuisbos Straat 42, Langebaan

Kontaknommer: 082 565 5515

hierin wettiglik verteenwoordig deur Pieter Jacobus Osborne in sy hoedanigheid as direkteur en behoorlik daartoe gemagtig.

The plaintiffs maintained that this description was wrong; the real buyer was not PJ Osborne (Pty) Ltd but a registered "shelf company" ("rakmaatskappy") to be acquired for the purposes of the contract.

3 The pleadings

The plaintiffs claimed delictual damages from the defendants, jointly and severally, basing their claim on the alleged failure of Le Roux to disclose certain facts during the pre-contractual negotiations. In their particulars of claim the plaintiffs asked for rectification of the written agreement by replacing the description of the buyer in the document with the following provision:

Die koper word verteenwoordig deur Pieter Jacobus Osborne. 'n Geregistreerde rakmaatskappy sal vir die doel van die koop as koper aangekoop waarna 'n gepaste beskikbare naamsverandering en reservering tot die Registrateur van Maatskappye gerig sal word. Sodanige maatskappy se naam wat goedgekeur word deur die Registrateur van Maatskappye, sal daarna op hierdie kontrak aangebring word teenoor die parawe van Le Roux en Osborne.⁴

The defendants noted several exceptions to the plaintiffs' particulars of claim.

⁴ Translation: The purchaser is represented by Pieter Jacobus Osborne. A registered shelf company will be acquired for the purpose of the purchase, after which an appropriate available change of name and reservation will be sent to the Registrar of Companies. The company name which is approved by the Registrar of Companies will then be inserted into this contract next to the initials of Le Roux and Osborne.

4 The judgment

Judge Blignaut found it unnecessary to deal with the exceptions because, in his view, the plaintiffs' particulars of claim had four "basic defects" which affected "the validity of the ... particulars of claim as a whole".⁵

The first defect was that Osborne had no *locus standi* in the proceedings – in other words, no right to claim the relief which he sought.⁶ He had acted merely as the representative of the buyer when concluding the contract and paying the deposit and, accordingly, had not personally acquired any rights or incurred any liabilities *vis à vis* the defendants.⁷ In addition, the plaintiffs had not alleged that any legal interest of Osborne had been infringed, nor that he had suffered any damage, both of which are essential requirements for delictual liability.⁸

The second defect was that the "formal agreement of sale" – the expression used by Judge Blignaut to describe the agreement of sale as it was recorded in writing⁹ – was "void for vagueness as the alleged true purchaser (the shelf company) [had] ... not been identified".¹⁰ Judge Blignaut applied the principle that the material terms of an agreement must be identified with sufficient certainty, failing which the agreement is void for vagueness.¹¹ In the present case, a purchaser had been adequately identified in the formal agreement of sale but, according to the plaintiffs, the real purchaser was the shelf company and its description was so vague that it could not be identified at all. The concept of a shelf company had not been defined and the relevant shelf company had not been identified by name, registration number, or in any other way. The provision to be inserted provided that the shelf company was to be purchased at some stage in the future but it did not identify the

⁵ *Osborne* para 20.

⁶ *Osborne* paras 20-21, 26.

⁷ *Osborne* para 22-24.

⁸ *Osborne* para 25.

⁹ *Osborne* para 19.

¹⁰ *Osborne* para 20.

¹¹ *Osborne* paras 27-28.

proposed purchaser nor the proposed seller.¹² In terms of common law principles, the alleged true agreement of sale was therefore void for vagueness.¹³

The third defect identified by Judge Blignaut was that the contract was "invalid for non-compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981"¹⁴ as the true purchaser [had] ... not been identified in the formal agreement of sale".¹⁵ The main points in the judge's reasoning appear to be the following. Although the identity of the parties to an agreement is often described as an essential term, it is more appropriately described as an "essential part" of the agreement.¹⁶ The distinction is "normally not of great moment" but it is "useful to focus on [it]" when applying section 2(1) of the Act to a claim for rectification because "the statute itself uses the term 'parties', as opposed to the term 'alienation'".¹⁷ It is trite law that the written record of an agreement cannot be rectified unless it is valid *ex facie* the document.¹⁸ Also it stands to reason that an agreement cannot be rectified if that would result in an invalid agreement.¹⁹ Section 2(1) of the Act requires an agreement for the sale of land to be signed by "the parties thereto". This phrase, properly interpreted, refers to the true parties to the agreement. It is therefore "essential" in a claim for rectification that the true parties be identified in the written agreement.²⁰ In the present case, the formal agreement

¹² *Osborne* para 29.

¹³ *Osborne* para 30.

¹⁴ *Alienation of Land Act* 68 of 1981 (hereafter "the Act").

¹⁵ *Osborne* para 20.

¹⁶ *Osborne* para 32. Judge Blignaut cited the following passage from the judgment of Judge Caney in *Godfrey v Paruk* 1965 2 SA 738 (D) 739G-H: "In *Fram v Rimer* 1935 WLD 5 at p 8, Barry J said that the identity of the parties is as much an essential term of the contract as the subject matter, and this has been repeated more than once, but with the greatest respect to those who have used the expression 'essential term' it appears to me more appropriate to say that the identity of the parties is an essential part of the contract, as Horwitz AJ said in *Rademeyer v Hughes* 1946 OPD 430 at p 434, they are the parties between whom the terms of the contract have been agreed."

¹⁷ *Osborne* para 33.

¹⁸ The judge referred to *Magwaza v Heenan* 1979 2 SA 1019 (A); *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (SCA) paras 9-10.

¹⁹ *Osborne* para 34.

²⁰ In *Osborne* para 36, Judge Blignaut agreed with the view of Nienaber "Oor die Beskrywing van Partye" 258 that: "...die koopkontrak moet geteken word deur die partye daarby en gevolglik moet die identiteit en hoedanigheid van die partye 'daarby' blyk. 'Daarby' slaan kennelik op die werklike koopkontrak en nie maar net op die formele dokument wat die werklike koopkontrak dalk nie korrek weergee nie. In die voorbeelde genoem is die partye bes moontlik partye tot die dokument maar hulle is nie partye (in die tegniese sin hierbo genoem) tot die werklike

of sale purported to record an agreement between PJ Osborne (Pty) Ltd as purchaser and West Dunes Properties 176 (Pty) Ltd as seller, but according to the allegations made by the plaintiffs in support of their claim for rectification, no such agreement existed. The legal bond, on the plaintiffs' version of events, existed between a shelf company as purchaser and West Dunes Properties 176 (Pty) Ltd. The formal agreement, thus, failed to identify the true purchaser.²¹ For this reason the formal agreement was incapable of being rectified.²²

The fourth defect identified by Judge Blignaut was that "both the true and formal agreements of sale [were] ... invalid for non-compliance with [section 2(1) of the Act] as neither [had been] ... signed by the true purchaser".²³ Judge Blignaut pointed out that the statutory requirement that the agreement must be "signed by" the parties, properly interpreted, refers to the signatures of the true parties to the agreement. In the present case, in the absence of the signature of the true purchaser, the formal agreement was invalid and therefore incapable of being rectified. The true agreement was also not signed by the true purchaser and was, therefore, equally invalid.²⁴ A passage from Wulfsohn²⁵ supported this approach. The author said that rectification of the description of a party in a sale of land "presented a special class of problem because the signatures of the parties are required". The author added:

Thus, B may sign as the purchaser. But the prior oral agreement may have been ... that A and not B be the purchaser. ... A should thus have signed the writing. The court will not order A to sign, and A will not be the purchaser, due to the absence of his signature.²⁶

koopkontrak nie. En omdat die identiteit van die ware partye nie in die kontrak self vervat is nie, is die kontrak formeel nietig". Judge Blignaut considered that the import of this passage was as follows. In terms of s 2(1) of the Act an alienation of land must be signed "by the parties thereto". On a proper interpretation of this phrase it necessarily relates to the parties to the true agreement and not to the parties to the formal document. As the formal document does not identify the true purchaser it is invalid and therefore not capable of rectification.

²¹ *Osborne* para 35.

²² *Osborne* para 37.

²³ *Osborne* para 20.

²⁴ *Osborne* para 38.

²⁵ Wulfsohn *Formalities* 223.

²⁶ *Osborne* para 39.

It followed that the formal agreement of sale did not comply with the requirements of section 2(1) of the Act as one of the parties had not signed the agreement. This was a second reason why the formal agreement was not capable of being rectified.²⁷

5 Comment

5.1 Certainty

This note is concerned with rectification and not contractual certainty, but Judge Blignaut's reasoning regarding the element of contractual certainty calls for brief comment. The judge appears to have been unsure whether it was the "formal agreement" (the agreement of sale as it was recorded in writing) or "the alleged true agreement of sale" which had to be sufficiently certain to be enforced.²⁸ Clearly it was the latter agreement. The formal agreement had to describe the parties "with sufficient accuracy and particularity to enable [their] identity ... to be ascertained without recourse to evidence of an oral *consensus* between the parties",²⁹ but this was to ensure that the true agreement complied with the statutory requirement of writing, not because of any independent requirement of certainty applicable to the formal agreement.

Judge Blignaut concluded that the agreement was uncertain because the real purchaser could not be identified. But whether this was correct would appear to have been a matter for evidence, for example, of whether the buyer had acquired "a registered shelf company" (what the parties understood by this expression) for purposes of the contract. It is suggested that a more fundamental legal problem facing the plaintiffs was that the real buyer (the "shelf company" which Osborne allegedly intended to represent) was still to be acquired when the contract was concluded and, therefore, did not exist at that time. It is self-evident that a party cannot conclude a contract (or perform any juristic act) for a non-existent principal. Section 21 of the *Companies Act*³⁰ allows an exception to this principle in the case of a company that is "contemplated to be incorporated in terms of [the] Act but does

²⁷ *Osborne* para 40.

²⁸ Compare the conflicting remarks in *Osborne* paras 20 and 30.

²⁹ *Johnston v Leal* 1980 3 SA 927 (A) 938.

³⁰ *Companies Act* 71 of 2008.

not yet exist at the time", but the shelf company in the present case was still be *acquired* (not incorporated), so the statutory exception was not relevant. The inescapable result was that no contract was formed between the parties.

5.2 *Rectification of the incorrect description of the buyer*

The conclusion reached by Judge Blignaut was that the formal agreement was incapable of being rectified so as to reflect the correct description of the purchaser. Judge Blignaut referred to the principle applied in *Magwaza v Heenan*³¹ (referred to here as the "*Magwaza* principle") that rectification of a contract which statute requires to be in writing and signed is possible only if the document, on the face of it, complies with the statutory requirements,³² but the judge evidently considered that the principle was not applicable on the facts before him. It is difficult to discern a coherent thread in the judge's reasoning on this issue, but he seems to have proceeded from the premise that because the identity of the parties should be classified as an essential *part*, rather than merely an essential *term*, of the contract, rectification is not possible in a case of party misdescription unless the true parties are identified in the written agreement.

If this was, indeed, the judge's view, it cannot be supported. The courts have accepted that the *Magwaza* principle is equally applicable where the document incorrectly describes a party to the agreement and, in so doing, fails to identify him or her. In *Lazarus v Gorfinkel*,³³ Acting Judge Seligson (as he then was) expressly acknowledged this:

In principle I can see no reason why the doctrine of rectification should not be applied where a document wrongly records the identity of a party, so as to give effect to the intent of the true parties in terms of a prior oral agreement or understanding between them. Such a result is quite consistent with the decision of

³¹ *Magwaza v Heenan* 1979 2 SA 1019 (A).

³² The correctness of the *Magwaza* principle has been questioned: see, eg, Van der Merwe *et al Contract* 157; De Wet and Van Wyk *Kontraktereg* 30,323 fn 55; but the courts have followed it on numerous occasions and it is firmly entrenched. For recent applications, see *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 3 SA 107 (SCA) 110 para 6; *Reivelo Leppa Trust v Kritzinger* 2007 4 All SA 794 (SE) 796-797; *Swanepoel v Nameng* 2010 3 SA 124 (SCA) 127-128 paras 15-17; *Lombaard v Droprop CC* 2010 5 SA 1 (SCA) 6-10 paras 12-26.

³³ *Lazarus v Gorfinkel* 1988 4 SA 123 (C).

the Appeal Court in *Magwaza's* case, since there is a formally valid ... contract which is capable of rectification.³⁴

It is clear from this passage that there is nothing, in principle, to prevent rectification of writing which wrongly records the identity of one of the parties, this being consistent with *Magwaza's* case. It follows that if the incorrectly described party is, on the face of it, adequately identified for the purposes of the formalities statute, the incorrect description is capable of being rectified. In the *Osborne* case the incorrect description of the purchaser, on the face of it, *was* clearly sufficient to comply with the statutory formalities and so rectification of that description was competent.

It is suggested that Judge Blignaut also erred in adopting the stance that rectification is not competent if it will "result in an invalid agreement".³⁵ This view misconceives the purpose of rectification, which is merely to remove the disparity between the actual agreement and its documentary version. The invalidity of the rectified agreement is not, in itself, an obstacle to the granting of rectification, although, obviously, it rules out any question of enforcement of the rectified agreement. In *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd*³⁶ the appeal court applied this reasoning where the contract as rectified would possibly have been too vague to be enforced. Judge of Appeal Streicher³⁷ observed:

Rektifikasie van 'n kontrak het ten doel om die skriftelike dokument in ooreenstemming te bring met die ware bedoeling van die kontrakterende partye welke bedoeling hulle vanweë 'n gemeenskaplike fout nagelaat het om korrek op skrif te stel. Indien daardie ware bedoeling vaag is mag dit die geldigheid van die gerektifiseerde kontrak affekteer maar nie 'n verweerder se aanspraak op rektifikasie van die kontrak nie. Die reg is immers nie dat effek gegee sal word aan 'n skriftelike dokument wat die ooreenkoms tussen partye verkeerdelik weergee op

³⁴ *Lazarus v Gorfinkel* 1988 4 SA 123 (C) 131. See also *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (SCA) 1053; *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 3 SA 107 (SCA) 110 paras 5-6.

³⁵ *Osborne* para 34.

³⁶ *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd* 2002 3 SA 346 (SCA).

³⁷ *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd* 2002 3 SA 346 (SCA) 352 para 14. Translation: Rectification of a contract has as its purpose the bringing of the written document into harmony with the true intention of the contracting parties, which intention they failed by reason of a common mistake correctly to put into writing. If that true intention is vague it might affect the validity of the rectified contract but not a defendant's claim for the rectification of the contract. The law is not, after all, that effect should be given to a written document which incorrectly reflects the agreement between the parties on the ground that the incorrect written version does indeed constitute a valid contract while that upon which the parties actually agreed does not constitute a valid contract.

grond daarvan dat die verkeerde skriftelike weergawe wel 'n geldige kontrak daarstel terwyl dit waarop die partye werklik ooreengekom het nie 'n geldige kontrak daar kon stel nie.

5.3 *Rectification of the true purchaser's signature*

Judge Blignaut was manifestly correct in holding that without the signature of the true purchaser (the shelf company) the agreement would be invalid. As the judge pointed out, the requirement of signature by both parties, properly interpreted, means signature by the real parties to the agreement, not the persons reflected in the document as the parties. It follows that if one of the real parties has not signed, then the agreement is void. Signature by the person reflected in the document as the party to the contract is legally irrelevant. Rectification of this signature is not possible, even if it appears, on the face of it, to be a valid signature, because the court cannot, under the banner of rectification, compel a contractant to sign. The *Magwaza* principle does not extend this far. The implication is that even if the document is rectified so as to correctly describe the real party, if he or she does not sign the agreement is void. The same position obviously obtains where only one party is required to sign, as in the case of suretyship or donation. If that party has not signed the invalidity cannot be cured by way of rectification, even if the document, on the face of it, appears to have been validly signed.

Was the signature of the true party – the shelf company – present in this case? Clearly it was not, because the company was still to be acquired, and therefore effectively did not exist, when Osborne signed the document. So even though Osborne may have fully intended to sign as agent for the shelf company, his signature was a legal nullity. It followed that the invalidity of the agreement could not be cured by rectification. The position would have been different had the shelf company been duly acquired by the time that signature took place. Wulfsohn,³⁸ in a further passage (appearing immediately after the passage cited by Judge Blignaut), makes it clear that where the description of a signatory's capacity is incorrect, the description may be rectified.³⁹ The author says:

³⁸ Wulfsohn *Formalities* 223.

³⁹ See also *Papenfus v Steyn* 1969 1 SA 92 (T) 94-98.

... A may have signed "for B", whereas in terms of the prior oral agreement A was alone to be the purchaser. Again, A may have signed as a party without qualifying his signature, whereas in terms of the prior oral agreement, B was the purchaser and A was to sign "for B". In such cases, as A's signature is present, rectification should be permissible, if the requirements therefor be present, in order to delete the words "for B" in the first case, and to add "for B" in the second case, provided that, in such latter case, when A signed he was "acting in terms of his written authority".⁴⁰

The signature of an agent being equivalent to signature by the principal, had Osborne intended to sign on behalf of a shelf company already acquired, the shelf company would for legal purposes have signed the contract. The physical manifestation of its signature (Osborne's signature) would have been on the document. Rectification of the incorrect description of Osborne's capacity in such a case would have been a viable option. The requirement of acting in terms of written authority referred to by Wulfsohn would not have been an obstacle because the requirement does not apply where the agent derives his or her authority to sign from a source other than authorisation by the principal⁴¹ (the position in the present case).

6 Conclusion

The decision in *Osborne* raises interesting issues regarding the competence and usefulness of rectifying an incorrect party description where the contract is required by law to be in writing and signed. It is suggested that when considering this question a court should keep in mind the following principles:

- Where a formalities statute requires signature by the "parties" to the agreement (or one of the parties), this means signature by the true parties to that agreement, not those reflected as the parties in the written record of the agreement.
- If a party to an agreement required by legislation to be in writing and signed has not, in fact, signed the written record of the agreement, the court cannot, under the banner of rectification, compel him or her to do so.

⁴⁰ Wulfsohn *Formalities* 223.

⁴¹ See *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC* 2010 3 SA 630 (SCA) 639 paras 21-23.

- An incorrect party description is capable of rectification, provided the *Magwaza* principle is adhered to. However, the rectification will not rescue the agreement from invalidity if the true party is required to sign the written record of the contract and has not done so (either personally or through an agent). The same applies if the "true party" does not exist and therefore cannot sign the document.
- If an agent has signed the document for one of the contractants and the document indicates incorrectly that the agent signed in a different capacity (for example, in his or her personal capacity or as the agent for some other party), the document may be rectified to indicate the signatory's correct capacity.

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